system, may treat the parties symmetrically and thus fairly.[3] Yet symmetry can exist (or not exist) in all types of electoral systems. Because most electoral systems in the United States are single-member districts that are winner-take-all, in practice they normally give a "bonus" of varying sizes (above proportionality) in seats to the party that wins a majority of the votes across a state. This common pattern does not violate the symmetry standard.[4] Nothing in the symmetry standard prevents States, either directly or because of the way in which districts happen to be drawn, from giving a greater percentage of seats to the victorious party than that party's total vote proportion. Indeed, in States where the plan is "fair" either because of bipartisan redistricting or a neutral districting commission, symmetry exists in complete harmony with the "bonus" given to the majority party due to the United States' single-member district system.

---

[3] Electoral systems that mandate versions of proportional representation do not necessarily produce partisan symmetry. See Browning & King, *Democratic Representation*, 81 Am. Pol. Sci. Rev. at 1257 Fig. 2 (modeling bias in a proportional representation system). Many European nations that use proportional representation have electoral systems that show partisan bias. *See* King, *Electoral Responsiveness*, 15 Leg. Stud. Q. at 174 & Tbl. 3.

[4] Partisan bias is the deviation from partisan symmetry. A separate concept is "electoral responsiveness." Electoral responsiveness indicates how responsive changes in seat outcomes are to changes in voter preferences. Electoral responsiveness, also referred to as the "bonus" for the majority party, the "swing ratio," or the "degree of representation," measures how much the seat division between the parties change as the vote proportions change. A purely proportional system is one in which a one percent increase in the votes for a party leads to a one percent increase in seats for that party. In the United States, a one percent increase in votes for a party normally leads to a two to three percent increase in seats. Under the symmetry standard, there is nothing necessarily unfair about one party winning a greater proportion of seats than the other. An electoral system may have any degree of partisan bias, no matter what level of responsiveness happens to exist. See Browning & King, *Democratic Representation*, 81 Am. Pol. Sci. Rev. at 1254-58 & 1259 Fig. 3.

The guiding test of the symmetry standard is whether the map treats similarly-situated parties equally—whether both parties have the *opportunity* to capture the same amount of seats, if they receive a particular percentage of the statewide vote. That the Democratic Party may receive only 38% of the seats if it receives 45% of the Statewide vote matters only in comparison to how the Republican Party would fare if it receives 45% of the Statewide vote.

II. WELL-ACCEPTED AND WIDELY USED METHODS EXIST FOR MEASURING THE PARTISAN BIAS OF PROPOSED LEGISLATIVE REDISTRICTING PLANS

A consensus exists about using the symmetry standard to evaluate partisan bias in electoral systems. But such a consensus does not answer the subsidiary question: how to measure symmetry itself in order to determine whether partisan bias exists. Over the more than thirty years that scholars have worked on defining fairness as partisan symmetry, they also have developed a sequence of closely related, and steadily improving, statistical methods that measure the degree of partisan bias in proposed legislative redistricting plans. These methods, outlined in the articles cited in Section I, rely on well-tested and well-accepted statistical procedures.

Statistical methods and computer software using the symmetry standard examine all relevant election-related data, and employ an approach to calculate the difference in seats that the two parties would receive at a given vote level.[5] Using well-accepted techniques, these models allow experts to measure the number of seats that a party would win at a

---

[5] This brief provides a relatively non-technical introduction to the research methodology used in the field. The articles cited in the text, published in peer-refereed academic journals, describe the methodology more fully.

given vote level. And the methods can separate partisan bias from other factors. While the actual inputs may vary to some degree from approach to approach, most rely on details of the proposed redistricting plans, all recent election results, the presence of an incumbent in the district, and whether the race is contested. Gelman & King, *Unified Method*, 38 Am. J. Pol. Sci. at 523-25. Other factors may include party registration data, prior party control of the district, candidate quality, and demographic characteristics of the voting age population. *Id.* at 525-26.[6]

Experts can disagree about which set of input data is relevant for a given case, but the resulting measures of partisan bias normally will not differ to any significant degree.[7] Because social scientists studying partisan bias rely on the

---

[6] Any number of programs, both commercial and free, can analyze the relevant data to measure partisan bias.

[7] The methodology of quantifying the amount of partisan bias in a particular plan of course is subject to the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 573, 573-75 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149-52 (1999), as is any application of statistical methodology. While the standard methodology for measuring symmetry and partisan bias is well-established, peer-reviewed, and reliable, the question whether it meets *Daubert* is not a question that this Court needs to decide in order to adopt the symmetry standard. Rather, courts will apply the traditional criteria for admitting expert evidence and determine in each case (1) whether the experts are qualified; and (2) whether their particular methodology is reliable. Indeed, a similar process already exists in other voting rights contexts. Under *Thornburg v. Gingles*, 478 U.S. 30, 52-54 (1986), and its progeny, courts regularly use statistics to determine racial bloc voting and to decide whether a minority group can elect a candidate of its choice. In each instance, the court must make a judgment about the expert and the methodology. For a thorough discussion of the different statistical standards used to determine whether a plaintiff has met the *Gingles* test and their reliability, see *Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 995-1005 (D.S.D. 2004) (discussing the various standards and surveying cases that apply these standards).

symmetry standard as the baseline for attempting to calculate the degree of bias, any difference of opinion is limited in scope and concerns chiefly the methodology used to calculate the percentage of seats that a particular party would receive at a given vote level. In practice, these differences have been minor.

Models applying the symmetry standard are by their nature predictive, just as the legislators themselves are predicting the potential impact of the map on partisan representation. The symmetry standard and the resulting measures of partisan bias, however, do not require forecasts of a particular voting outcome. Rather, by examining all the relevant data and the potential seat divisions that would occur for particular vote divisions, it compares the potential scenarios and determines the partisan bias of a map, separating out other potentially confounding factors. Importantly, those drawing the map have access to the same data used to evaluate it, and no data is required other than what is in the public domain. The question is not whether a particular party *will* win; it is whether one party has stacked the deck to such a degree that the plan burdens the other party's "rights of fair and effective representation." *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). *Cf.* Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* 209 (2005) (noting that in the 1858 Lincoln-Douglas Senatorial election, Lincoln lost even though he received a majority of votes cast because the State Legislature, which picked Senators at the time, was heavily gerrymandered for the Democrats).

III. THE SYMMETRY STANDARD ALLOWS THIS COURT TO DECIDE BY POLITICALLY-NEUTRAL AND OBJECTIVE PRINCIPLES WHETHER A PARTICULAR PLAN IS OVERLY PARTISAN

The ability to quantify partisan bias in a redistricting plan, and to distinguish partisan bias from other factors, permits this Court to adopt a rule that prevents gerrymandering from inhibiting a political group's representational rights. *Amici* take no position on how this Court could best implement a test for unconstitutional partisan gerrymandering that is based on evaluating the level of partisan bias in a plan. Yet the symmetry standard and the methodology applying it are just as "clear, manageable, and politically neutral," *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring in the judgment)—if not more so—than other standards used to evaluate districting plans. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 55-61, 74-77 (1986) (using statistics to determine the existence of racial bloc voting, a necessary part of any § 2 claim); *Shaw v. Reno*, 509 U.S. 630, 646-49 (1993) (explaining how to decide whether a racial gerrymander is unconstitutional and examining "appearance," among other factors); *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (discussing influence and coalitional districts and noting that "[t]he ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine"). And this Court's jurisprudence in other voting rights contexts suggests three different possible approaches for using the symmetry standard to determine the existence of an unconstitutional partisan gerrymander.

First, this Court could announce a rule of allowing a State to engage in as little partisan bias as necessary to further other compelling interests. In the one-person, one-vote context, this Court has required zero deviation for Congressional districts, while still permitting the State to justify any dis-

crepancy in population with a showing of compelling need. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 740–41 (1983). Moreover, the State need only achieve complete population equality "as nearly as practicable." *Id.* at 730. So long as a State attempts in good faith to create equal districts, the plan passes constitutional muster. *Id.* at 730-31.

The symmetry standard allows this Court to announce a similar rule in the partisan gerrymandering context: States must make a good-faith effort to achieve as little partisan bias as possible. States could justify any deviation by pointing to a legitimate interest such as compactness, respecting municipal boundaries, or preserving the core of prior districts. *Cf. id.* at 740.

States can comply with the "as little as possible" rule quite simply. The sophistication of computer mapping technologies allows States to add "no partisan bias" to their criteria in creating a redistricting plan. *Cf. id.* at 733 (noting that in 1983, "[t]he rapid advances of computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has"). Whenever a State redistricts, it is possible to measure the partisan bias in a plan using the symmetry standard. Likewise, States know the total population before redistricting, and because application of the one-person, one-vote standard is simple, relatively little litigation results. Just as in the one-person, one-vote context, if this Court sets a clear rule beforehand, the amount of litigation about the rule post-issuance would be relatively limited. Finally, a rule of "as little as possible" captures both the "subtle" and the "blatant" gerrymander, each of which burdens a group's representational rights. *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment).

Second, this Court could establish a rule that prevents partisan bias to the extent that it allows the manipulating

party to gain control of one or more legislative seats to which it otherwise would not win. In other words, the symmetry standard allows courts to propound a simple and politically-neutral rule—whether the proposed map is so partisan that, as compared to a politically neutral map, it would cause one party to lose a legislative seat. Through the use of experts, a plaintiff would have to prove that a map would cause a group to lose a seat. *Cf. Gingles*, 478 U.S. at 44-46 (imposing a test for justiciability under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, that requires a showing that the minority population is "sufficiently large and compact to constitute a majority in a single-member district" so there exists a potential remedy plan with at least one more district in which minorities have a realistic opportunity to elect candidates of choice than is found in the challenged plan).

Third, this Court could allow partisan bias in districting so long as it does not rise above a certain percentage. The symmetry standard allows courts to calculate the percentage difference in seats that a party would receive at any given level of the vote. If the average percentage difference between the two parties is above a particular threshold (whether it be 3, 5, or 10%), the plan would be unconstitutional. For example, if the court set the standard at 10%, a plan would not be unconstitutional unless the Democratic Party would capture 55% of the seats with 50% of the vote whereas the Republican Party would capture only 45% of the seats with 50% of the vote. *Cf. Brown v. Thompson*, 462 U.S. 835 (1983) (above 10% population deviation is *prima facie* unconstitutional for state legislative districts); *id.* at 852 (outlining test for determining when a plan is unconstitutional).

This third approach allows courts to consider what level of partisan gerrymandering is unconstitutionally "egregious." *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). Studies of past partisan gerrymanders have shown that many gerrymanders have a partisan bias of 1-3 percentage points. In egregious cases, the difference is

greater than 5 percentage points, and it is only in the very rare and extreme case that a gerrymander results in a difference of over 10 points. Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 Am. Pol. Sci. Rev. 541, 546 Fig. 2 (1994) (showing 15 states over a twenty-year period where the partisan bias rarely exceeded 5 percentage points and never exceeded 10 percentage points); Gary King, *Representation through Legislative Redistricting: A Stochastic Model*, 33 Am. J. Pol. Sci. 787, 814 (1989) (noting that the effect of the partisan gerrymander passed by Connecticut in the early 1970s that was at issue in *Gaffney v. Cummings*, 412 U.S. 735 (1973), was 3 percentage points); Robert X. Browning & Gary King, *Seats, Votes, and Gerrymandering. Estimating Representation and Bias in State Legislative Redistricting*, 9 Law & Pol'y 305, 318 (1987) (examining the Indiana plan in the 1980s that was the subject of *Davis v. Bandemer* and concluding that the House plan had a bias of 6.2 percentage points while the Senate plan had a bias of 2.8 percentage points); King & Browning, *Democratic Representation*, 81 Am. Pol. Sci. Rev. at 1262 Fig. 5 (showing bias in all States, with the plurality showing little if any bias, the vast majority falling within 5 percentage points, a few between 5 and 10, and even fewer above 10); *id.* at 1269 (listing bias figures for all States and showing only one State with a bias of above 10 percentage points); Gary W. Cox & Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* 57-59 (2002) (finding extreme cases of gerrymandering at as much as 8 percentage points).

A rule that tolerates a particular degree of partisan bias would recognize that this Court is willing to permit some amount of burden on the rights of political groups in exchange for limited court involvement in only the most extreme of cases. As experience has shown, and as this Court has recognized, savvy legislators will take advantage of all the leeway that this Court will allow. *Cf. Karcher*, 462 at 731

("If state legislators knew that a certain *de minimis* level of population differences were acceptable, they would doubtless strive to achieve that level rather than equality."). Yet even a rule that policed only extreme cases would curtail some abuses. *Cf.* Gelman & King, *Enhancing Democracy*, 88 Am. Pol. Sci. Rev. at 541 (noting that while a redistricting plan may increase partisan bias in a particular instance, regular redistricting every ten years leads to less partisan bias than no redistricting at all over a period of decades).

Regardless of any rule that this Court adopts—especially if it is no rule—redistricting always will be political to some degree. Yet not all political consequences lead to an unconstitutional burden on the minority party. Any rule limiting partisan gerrymandering still preserves some political component to redistricting. Decisions of where to draw the lines and what communities to include inevitably have some political fallout. The symmetry standard does not necessarily affect the decision of where to place politically-sensitive land. *Cf. Vieth*, 541 U.S. at 358 (Breyer, J., dissenting). Moreover, the majority party may well decide to give the party that wins a majority of the vote (say 51%) an even-greater majority of seats (say 60%). Such a plan favors the majority party, but would not be unconstitutional under any approach so long as the minority party could win the same 60% of seats if it receives 51% of the vote.

And if this Court adopts any rule based on the symmetry standard, lower courts and this Court will flesh out the particulars of the rule in the future. Indeed, in the one-person, one-vote context, once this Court determined the general standards in *Reynolds v. Sims*, 377 U.S. at 377, and *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964), subsequent cases simply became legal arguments about exactly what level of population deviation was unconstitutional in given circumstances. *See, e.g., Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Mahan v. Howell*, 410 U.S. 315 (1973); *White v. Weiser*, 412 U.S.

783 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Regester*, 412 U.S. 755 (1973); *Connor v. Finch*, 431 U.S. 407 (1977); *Brown v. Thompson*, 462 U.S. at 835; *Karcher v. Daggett*, 462 U.S. at 725; *Larios v. Cox*, 300 F.Supp. 2d 1320 (N.D. Ga. 2004) (three-judge panel) (per curiam), *aff'd*, 542 U.S. 947 (2004). Similarly, this Court could set a general rule prohibiting partisan gerrymanders, and let courts decide the specifics of the issue as facts develop in the future. *Cf. Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) (suggesting that no manageable standard developed after *Davis v. Bandemer* because lower courts could do nothing except follow that decision); *id.* at 344-45 (Souter, J., dissenting) (same).

The signatories of this brief take no position on whether the particular Texas plan in this case is unconstitutional. None has independently examined the partisan bias in the current Texas map. The symmetry standard has achieved consensus within the social science community as a measure of bias because it is a politically-neutral measure that does not require examining proxies such as shape of the district, compactness, or traditional political boundaries. Instead, it evaluates the bias directly by comparing whether the plan treats similarly-situated parties similarly. Regardless of the merits of this particular lawsuit, the symmetry standard is "a suitable standard[] with which to measure the burden a gerrymander imposes on representational rights." *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring in the judgment).

CONCLUSION

In deciding this case, this Court should take into consideration the symmetry standard, as it measures partisan bias itself and it allows courts to decide in a politically-neutral and objective manner whether the State's plan is fair to all political groups.

Respectfully Submitted,

H. LEE GODFREY
CAROLYN COURVILLE
SUSMAN GODFREY L.L.P.
1000 Louisiana Street
Suite 5100
Houston, TX 77002
(713) 651-9366

JUSTIN A. NELSON *
SUSMAN GODFREY L.L.P.
1201 Third Avenue
Suite 3800
Seattle, WA 98101
(206) 516-3880

* Counsel of Record

Counsel for Amici Curiae

(21) (21) (22)

Nos. 05-204, 05-254, 05-276 & 05-439

Supreme Court, U.S.
FILED
JAN 9 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LEAGUE OF UNITED
LATIN AMERICAN CITIZENS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF OF *AMICI CURIAE* THE REFORM INSTITUTE, THOMAS MANN, AND NORMAN ORNSTEIN IN SUPPORT OF APPELLANTS

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Rd.
Charlottesville, VA 22903
(434) 924-3127

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

EDDIE JACKSON, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

GI FORUM, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 9

I. UNPRECEDENTED PARITY BETWEEN THE TWO MAJOR PARTIES ON THE NATIONAL LEVEL HAS CREATED GREAT PRESSURE TO MAKE INDIVIDUAL HOUSE DISTRICTS SAFE FOR ONE MAJOR POLITICAL PARTY OR THE OTHER 9

A. The Near Equal Division of the House of Representatives, Its Widening Ideological Polarization, and the Increasing Homogeneity of Each of the Two Major Parties Mean That a Small Change in House Seats Matters Much More Than Before 9

B. The Increasing Pressure to Gain Seats Has Led to Making House Districts Uncompetitive in a Way That Favors One Party 14

II. ADVANTAGING ONE PARTY BY MAKING HOUSE DISTRICTS UNCOMPETITIVE UNDERMINES THE UNIQUE ROLE OF THE HOUSE OF REPRESENTATIVES IN AMERICAN GOVERNMENT 19

A. By Deadening Competition in House Districts, Partisan Gerrymandering Dangerously Weakens the Responsiveness and Accountability of Representatives to Voters in Their Districts 19

TABLE OF CONTENTS – Continued

Page

B. By Artificially Advantaging One Political Party over Another, Partisan Gerrymandering Can Be Expected to Skew Public Policy for the Duration of the Reapportionment Cycle 25

C. Partisan Gerrymandering Artificially Increases Ideological Polarization in the House 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Badham v. Eu, 694 F. Supp. 664 (N.D. Calif. 1988), *aff'd*, 489 U.S. 1024 (1989) 27

Balderas v. Texas, 536 U.S. 919 (2002) 12

CONSTITUTIONAL PROVISION

U.S. Const. art. I, § 2 2

OTHER AUTHORITIES

John Adams, *Thoughts on Governance*, *in* 4 Papers of John Adams 87 (Robert J. Taylor ed., 1977) 2

Michael Barone & Richard E. Cohen, The Almanac of American Politics 2006 (Nat'l J. Group 2006) 4

David Brady & Morris Fiorina, *Congress in The Era of the Permanent Campaign*, *in* The Permanent Campaign and Its Future 134 (2000) 29

Bruce Cain, The Reapportionment Puzzle (1984) 17, 27

Michael J. Dubin, United States Congressional Elections, 1788-1997: The Official Results (1988) 3

The Federalist No. 52 (James Madison) (Robert Scigliano ed., 2001) 2

The Federalist No. 57 (James Madison) (Robert Scigliano ed., 2001) 3

David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. Times A1 (July 1, 2003) 12

TABLE OF AUTHORITIES – Continued

Page

Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 Election L.J. 179 (2003) ..... *passim*

Gary C. Jacobson, *A House and Senate Divided: The Clinton Legacy and the Congressional Elections of 2000*, 116 Pol. Sci. Q. 5 (2001) 9

Gary C. Jacobson, *Polarized Politics and the 2004 Congressional and Presidential Elections*, 120 Pol. Sci. Q. 199 (2005) 5, 18, 27

Gary C. Jacobson, The Politics of Congressional Elections (5th ed. 2001) 10, 18

Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 Pol. Sci. Q. 1 (2003) 18, 20, 25, 27

Office of the Inspector General, Department of Justice, An Investigation of the Department of Justice's Actions in Connection with the Search for Absent Texas Legislators (Aug. 12, 2003), *available at* http://www.usdoj.gov/oig/special/0308a/final.pdf 13, 14

Office of Inspector General, U.S. Department of Homeland Security, Report of Investigation IN03-OIG-0662-S, *available at* http://www.dhs.gov/interweb/assetlibrary/DHS_OIG_Investigation_Texas.pdf 13

Norman J. Ornstein, Thomas E. Mann & Michael J. Malbin, Vital Statistics on Congress 2005-2006 (Nat'l J. Group forthcoming 2006) 4, 5

TABLE OF AUTHORITIES – Continued

Page

Keith T. Poole & Howard Rosenthal, Congress: A Political-Economic History of Roll Call Voting (1999) 10

Statement of Hon. Kenneth M. Mead, Inspector General, U.S. Department of Transportation, Federal Aviation Administration Efforts to Locate Aircraft N711RD (July 15, 2003) (testimony to House Committee on Transportation and Infrastructure), *available at* http://www.oig.dot.gov/StreamFile?file=/data/pdfdocs/cc2003123.pdf 13

Statement of the Committee Regarding Disposition of the Complaint Filed Against Representative Tom DeLay, House Comm. of Official Conduct, 108th Cong., 2nd Sess., *available at* http://www.house.gov/ethics/DeLay_Cover.htm (Oct. 6, 2004) 14

Texas Democrats Are Fined by G.O.P., N.Y. Times A9 (Aug. 15, 2003) 12

INTEREST OF *AMICI CURIAE*[1]

The Reform Institute, Inc. is a not-for-profit 501(c)(3) educational organization representing a thoughtful voice of reform in debates over campaign finance and election administration. Former Congressman Amo Houghton serves as Chair of the Board. The Reform Institute has three main roles: (1) to reduce political corruption and the appearance of corruption; (2) to promote discussion about how best to reform election registration and voting procedures in order to increase meaningful citizen participation in the democratic system; and (3) to promote and defend citizen reform initiatives that seek to open the doors of the voting process. The present case concerns whether a state legislature can redraw congressional districts so as to minimize the likelihood that a particular political party's candidates will win in the election. It directly implicates the Reform Institute's second role of increasing meaningful citizen participation in the democratic system.

Thomas E. Mann and Norman J. Ornstein are political scientists at the Brookings Institution and the American Enterprise Institute, respectively. In their 35-year careers, they have individually and jointly written extensively about Congress, elections, redistricting and American politics and government generally. Active in congressional, election, campaign finance, and other institutional reform efforts, their professional lives have

---

[1] *Amici Curiae* certify that no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties, as indicated by letters of consent filed with the Court.

been focused on the health and vibrancy of American political institutions. Their biennial book Vital Statistics on Congress is in its twelfth edition. Their newest book, The Broken Branch, will be published by Oxford University Press in June 2006. Their joint AEI/Brookings efforts have included the Renewing Congress Project, Five Ideas for Practical Campaign Reform, the Transition to Governing Project, the Alternatives to the Independent Counsel Project, the Continuity of Government Commission, and the Election Reform Project. Mann is co-editor of Party Lines: Competition, Partisanship, and Congressional Redistricting, recently published by Brookings.

SUMMARY OF ARGUMENT

The Framers envisioned the House of Representatives as a unique structure of the national government. Unlike the Senate, the President, or the courts, it was to have "an immediate dependence on, and an intimate sympathy with, the people." The Federalist No. 52, at 337 (James Madison) (Robert Scigliano ed., 2001). As John Adams put it, the body of the people's representatives should "be in miniatur[e] an exact portrait of the people at large. It should think, feel, reason, and act like them." John Adams, *Thoughts on Governance*, *in* 4 Papers of John Adams 87 (Robert J. Taylor ed., 1977). With this in mind, the Framers carefully designed the House to "bin[d] the representatives to their constituents . . . [and] to extend the influence of the people over their representatives." The Federalist No. 52, at 339. They insisted on direct election "by the People of the several States," a broad franchise, regular reapportionment as among the states, and frequent elections. U.S. Const. art. I, § 2. Of these, the last was the

most important, for "without the restraint of frequent elections" in the House, the Framers thought, "[a]ll [other] securities [against oligarchy] would be found very insufficient. . . ." The Federalist No. 57, at 367. By this device

> the House of Representatives is so constituted to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.

Id. Nearly every special feature of the House's design was meant to ensure that it, unlike the other primary structures of the federal government, was highly responsive to public sentiment.

Unfortunately, congressional redistricting has defeated much of the Framers' vision and intercensal redistricting threatens it even further. High rates of incumbent reelection, declining competitiveness of congressional districts, and long periods of one-party control of the House have eroded the accountability and legitimacy of the people's chamber. The 2002 congressional elections make this point starkly. Only four challengers defeated House incumbents – the lowest number in modern American history. Michael J. Dubin, United States Congressional Elections, 1788-1997: The Official Results (1988); Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional*

Redistricting, 2 Election L.J. 179, 182 (2003). Only 43 House incumbents, moreover, won reelection "narrowly" – defined generously as by less than 60 percent of the vote – while 338 House incumbents enjoyed very large victory margins – 20 percent or more – including 78 who ran unopposed by a major party challenger. *Id.* at 183 & tbl. 1; *see* Michael Barone & Richard E. Cohen, The Almanac of American Politics 2006 (Nat'l J. Group 2006) (providing underlying information on each House race for computation of number of incumbents running unopposed by major party challengers). In the nation's largest state, California, not a single challenger in the general election received as much as 40 percent of the vote. Hirsch, *supra*, at 182. And more than a third of all States sent to Congress *exactly* the same House delegation as before. *Id.*

These facts are particularly striking because the 2002 elections were the first held after the latest reapportionment. Historically, incumbents suffer in such elections. As their old voters disappear and new voters replace them, incumbents usually find their seats less secure. Their new voters can have quite different interests than their previous constituents. From 1972 to 1992, in fact, House turnover averaged 45 percent higher in immediate post-reapportionment Congresses. These Congresses contained an average of 87 freshmen, while the others in this period contained only 60. *Id.* at 183. In 2002, however, only 53 freshmen were elected to the House – less than half the number elected in 1992. *See* Norman J. Ornstein, Thomas E. Mann & Michael J. Malbin, Vital Statistics on Congress 2005-2006 at tbl. 2-7 (Nat'l J. Group forthcoming 2006) (calculated by subtracting number of incumbents reelected listed in sixth column from 435, the overall number of representatives). In 2002, incumbents had a very easy ride

overall. Only 35 incumbents retired (rather than the average of 48 in other recent post-reapportionment Congresses); only eight lost in the primaries and only eight lost in the general election, in each case half the time to another incumbent. *Id.* This lack of competition was, moreover, peculiar to the people's chamber. On the same day that less than ten percent of House races were being decided by margins of ten percent or less, nearly half of all gubernatorial and U.S. Senate races were that close. Hirsch, *supra*, at 183. One significant difference, of course, is that no one can gerrymander a statewide district.

The 2004 elections were hardly better. Only seven out of the 402 incumbents seeking reelection were defeated and four of these were victims of the partisan-motivated, intercensal gerrymander in Texas. Gary C. Jacobson, *Polarized Politics and the 2004 Congressional and Presidential Elections*, 120 Pol. Sci. Q. 199, 199 (2005) (hereinafter "*Polarized Politics*"). Without the one-time Texas gerrymander, in fact, only eight House seats would have changed party, an all-time low. *Id.* at 200. The Texas intercensal redistricting had two primary effects. First, it meant that Republicans gained rather than lost House seats in the nation overall. *Id.* at 201. The plan, which was designed to eliminate seven incumbent Democrats, led to one targeted incumbent changing parties, one retiring, four losing in the general election, and only one surviving. *Id.* at 201-02. Second, it further shored up each congressional district in the state for one party or the other. Of the 22 districts where incumbents ran with an underlying partisan majority, the incumbent's average share of the two-party vote was 75 percent. App. to Juris. Statement of Eddie Jackson 225a. Revisiting the post-census redistricting thus allowed the state to radically change the partisan